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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **OAKLAND DIVISION**

15 STARDOCK SYSTEMS, INC.,

Case No.: 4:17-cv-07025-SBA

16 vs.
17 Plaintiff,

**STARDOCK SYSTEMS, INC.'S NOTICE OF
EX PARTE MOTION AND MOTION FOR
TEMPORARY RESTRAINING ORDER AND
ORDER TO SHOW CAUSE WHY
PRELIMINARY INJUNCTION SHOULD NOT
BE GRANTED**

18 PAUL REICHE III and ROBERT
19 FREDERICK FORD,

20 Defendants.

21 Date:
Time:
Place:
22 Judge: The Hon. Saundra Brown Armstrong

23 **AND RELATED COUNTERCLAIM**

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26
27
28 **NOTICE OF MOTION AND MOTION FOR TEMPORARY RESTRAINING ORDER
AND/OR PRELIMINARY INJUNCTION**

1 **TO DEFENDANTS PAUL REICHE III AND ROBERT FREDERICK FORD AND THEIR**
 2 **COUNSEL OF RECORD:**

3 PLEASE TAKE NOTICE that, at a time to be set by the Court, in the courtroom of the
 4 Honorable Saundra Brown Armstrong of the United States District Court for the Northern District
 5 of California, Plaintiff Stardock Systems, Inc. (“Stardock”) shall and hereby does apply to this
 6 Court, pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Rule 65-1, for a
 7 temporary restraining order, as well as an order to show cause why a preliminary injunction
 8 should not issue, enjoining and restraining Paul Reiche III (“Reiche”) and Robert Frederick Ford
 9 (“Ford”) (collectively, “Defendants”) from submitting any DMCA notices directed to any of the
 10 material that is the subject of the present litigation, and in particular, to the *Star Control: Origins*
 11 video game that is scheduled to be released on September 20, 2018. Stardock also requests that
 12 the Court construe 17 U.S.C. Section 512(g)(2)(C) as requiring that the person or entity that
 13 submitted the notification must have at least filed a motion for a “restraining order”, if not
 14 obtained an order granting that motion, and presented that order to the service provider in order
 15 for the service provider to keep the targeted material down.

16 **Stardock specifically requests that the TRO issue for a period of not less than**
 17 **twenty-eight (28) days. If the TRO is not issued, Stardock moves, upon good cause shown,**
 18 **for expedited briefing and an expedited hearing on its request for an order to show cause as**
 19 **to why a preliminary injunction should not be granted as soon as possible and by no later**
 20 **than September 19, 2018.**

21 This application and motion is made on the grounds that: (1) Stardock will continue to
 22 suffer immediate and irreparable harm unless Defendants are enjoined from submitting DMCA
 23 notices directed at any Stardock material that is the subject of this lawsuit and particularly the
 24 *Star Control: Origins* video game scheduled to be released September 20, 2108; (2) Defendants’
 25 are not likely to succeed on their copyright infringement claim and there are serious questions
 26 going to the merits of those claims; (3) the balance of hardships tips strongly in favor of Stardock;

1 and (4) the public interest overwhelmingly supports the issuance of a temporary restraining order
 2 and a preliminary injunction.

3 This application and motion is based on the accompanying Memorandum of Points and
 4 Authorities; the supporting declarations and exhibits of Bradley R. Wardell and Robert A.
 5 Weikert and such other written or oral argument as may be presented at or before the time this
 6 motion is taken under submission by the Court.

7 Notice of this application and motion has been given to counsel for Defendants by the
 8 undersigned on September 6, 2018, via and email. (Declaration of Robert A. Weikert, ¶ 9, Exh.
 9 F) Pursuant to Local Rule 65-1, a copy of the Complaint is attached as Exhibit A to Robert A.
 10 Weikert's Declaration in Support of this motion. Notice of the hearing location, date, and time
 11 will be given to Defendants when that information is set. Delivery of this application and motion,
 12 and all supporting papers, to Defendants' counsel will be made upon the filing of this application.

13 Dated: September 7, 2018

14 Respectfully submitted,

15 **NIXON PEABODY LLP**

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28
 29 NOTICE OF MOTION AND MOTION FOR TEMPORARY RESTRAINING ORDER
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I. INTRODUCTION

Plaintiff Stardock Systems, Inc. (“Stardock”) sits on the edge of imminent and irreparable harm. Stardock has spent over five (5) years and ten (10) million dollars to develop and promote its new video game, *Star Control: Origins* (“*Origins*”), and promised a September 20, 2018 worldwide release through the leading online channels for downloadable games (Steam and GOG).¹ Stardock announced the official September 20, 2018 release date nearly three months ago, just before the massive “E3” gaming convention in June, and has continued to heavily promote the *Origins* release with extensive marketing, leading to over 10,000 pre-orders of *Origins* so far. Since November 2017, Stardock has allowed customers who pre-ordered the game to play a beta version of a space combat mini-game (*Star Control: Origins* – Beta 1: Fleet Battles (“Fleet Battles”)). In August, to further promote interest in the massive September 20 launch, Stardock provided downloadable content (“DLC”) packs with pre-orders. These DLC packs gave access to new musical content that are not part of the *Origins* game itself, but relate to the *Origins* game concept.

Despite having knowledge since 2013 of the development of a game based on the *Star Control* concept, and the release of Fleet Battles in November 2017, Defendants Paul Reiche III (“Reiche”) and Fred Ford (“Ford”) (collectively “Defendants”) have laid in wait for the opportunity to inflict the greatest possible harm to Stardock, by foreclosing Stardock’s distribution channel on the eve of *Origins* global release. Defendants dubiously claim that *Origins*-related content violates vague copyright claims from an MS-DOS video game they purportedly created over 25 years ago. Defendants have already issued Digital Millennium Copyright Act (“DMCA”) notices, on August 17, 2018 and again on August 21, 2018, that effectively enjoined Fleet Battles and two DLC packs, forcing Stardock to decouple this add-on

¹ Steam (Valve Corporation d/b/a Steam) and GOG (GOG sp. z o.o. d/b/a GOG.com) are two of the largest and most well-known online video game distributors representing approximately 93% of Stardock's distribution channel. Declaration of Bradley R. Wardell ("Wardell Decl."), 16.

1 content from its pre-orders to continue selling the *Origins* game. Stardock promptly issued
 2 DMCA counter-notifications, and sought clarification as to the basis for Defendants' alleged
 3 copyright claims. Defendants ignored this request, but threatened Stardock with future DMCA
 4 takedown notices relating to *Origins*:

5 I suggest you ensure that Stardock refrains from releasing any future version of
 6 Star Control: Origins or content for use therein that is substantially similar to
 7 and/or derivative of my clients 'copyrighted works. We reserve the right to serve
 8 further DMCA notices as additional examples of Stardock's infringement are
 9 identified and as authorized by the DMCA.

10 Declaration of Robert A. Weikert in Support of Temporary Restraining Order ("Weikert Decl.")
 11 ¶5, Exh. D. Thus, despite only vague allegations of copyright infringement, Stardock is
 12 foreclosed from distributing any content that Defendants target—including the *Origins* release
 13 itself.

14 Hence, Stardock is obligated to seek relief from this Court to maintain the status quo, and,
 15 thereby protect its September 20th global release of *Origins*. Specifically, Stardock seeks,
 16 pursuant to Fed. R. Civ. P. 65 ("Rule 65") and Local Rule 65, a temporary restraining order, as
 17 well as an order to show cause why a preliminary injunction should not issue,² enjoining and
 18 restraining Defendants from submitting any further DMCA notices related to any of the copyright
 19 issues that are the subject of the present litigation (particularly the *Origins* game), and instead
 20 requiring the procedures of Rule 65 are followed for any urgent relief, as Stardock is doing here.

21 The primary basis for Stardock's request is that absent the emergency relief requested,
 22 Defendants will, by way of their abuse of the DMCA notice-and-takedown process, succeed in
 23 effectively obtaining an indefinite injunction against Stardock's sale and distribution of material
 24 at the core of the present suit. This application of the DMCA takedown process to the present

25 _____
 26 ² For brevity and ease of reading, further references throughout the memo will be made to
 27 "injunctive relief" with the understanding that such relief may include both a temporary
 28 restraining order and/or preliminary injunction.

1 case provides an end run around Rule 65, without any showing on the merits or the required
 2 posting of a bond pursuant to Rule 65(c). If Defendants are not blocked from further self-help,
 3 Stardock will suffer catastrophic harm before it can ever be heard on the merits. The Court
 4 cannot let this situation stand, as it would result in unconscionable hardship and irreparable harm
 5 to Stardock, including immediate layoffs of employees, reputational harm, damage to business
 6 relationships, and unquantifiable lost sales. The DMCA was intended to protect service providers
 7 and prevent piracy, not to inflict reputational damage or serve as a surrogate for either Rule 65 or
 8 a judicial determination. Indeed, the requirement of an “order to restrain” in Section 512(g) of
 9 the DMCA supports Stardock’s position, as any other interpretation would be at odds with Rule
 10 65, the copyright impoundment process, and Supreme Court precedent.

11 Although Defendants have the burden of showing ownership and copying, they effectively
 12 flip the process on its head through the use of the DMCA to target Stardock’s distribution
 13 channels. The result is the improvident issuance of an indefinite injunction, *on no record or*
 14 *showing*, thus depriving Stardock of due process. Yet there are serious questions that will be
 15 litigated before this Court as to the validity of Defendants’ alleged copyright registrations—the
 16 very same ones referenced in Defendants’ DMCA notices—as well as a host of other applicable
 17 and potent affirmative defenses. Defendants’ copyright claims (such as Reiche’s vague claim for
 18 creation of game “concepts”) are fundamentally flawed, as they are “premised partly upon a
 19 wholly erroneous understanding of the extent of copyright protection; and partly upon that
 20 obsessive conviction, so common among authors and composers, that all similarities between
 21 their works and any others which appear later must inevitably be ascribed to plagiarism.”
 22 *Litchfield v. Spielberg*, 736 F.2d 1352, 1358 (9th Cir. 1984) (internal citations omitted).
 23 Furthermore, Defendants’ claims either ignore or twist Stardock’s purchase of the *Star Control*
 24 assets from Atari, a purchase that cost Stardock \$300,000, to acquire intellectual property rights
 25 originally granted by Reiche to Accolade (Atari’s predecessor). The doctrine of equitable
 26 estoppel prevents Defendants from now coming forth, thirty years later, and attacking their own

1 1988 agreement in an attempt to exploit ambiguities or misrepresentations therein. Stardock
 2 should be given the opportunity to present these and other arguments to this Court, and receive a
 3 reasoned resolution of them through the judicial process. But without an order maintaining the
 4 status quo, Stardock will be deprived of this opportunity—as its *Origins* game will be sentenced
 5 to DMCA limbo before even so much as a hearing on the merits.

6 In short, the Court should not permit Defendants to obtain, via a flawed DMCA scheme
 7 that was not designed to address situations like this one, a “default” injunction on *Origins*. Any
 8 other result would create an untenable dichotomy rendering Rule 65 obsolete for internet-related
 9 copyright litigation, bypassing the due process protections afforded by Rule 65 and the U.S.
 10 Constitution while providing an enormous tactical advantage to copyright claimants, but
 11 explicitly requiring these protections in association with physical goods. To provide what should
 12 be a level playing field for the orderly resolution of the complicated legal and factual issues
 13 before the Court presently, the Court should grant the critical relief requested by Stardock. If
 14 Defendants have a good-faith objection to *Origins*, Rule 65 provides them with a well-settled
 15 mechanism for relief.

16 **II. RELEVANT PROCEDURAL BACKGROUND**
 17

18 On December 8, 2017, Stardock filed this action against Defendants, alleging trademark
 19 infringement of the STAR CONTROL mark and other related marks, copyright infringement; and
 20 related claims. Dkt. No. 1. On February 22, 2018, Defendants filed their Answer and
 21 Counterclaim, which included claims for copyright infringement and declaratory relief related to
 22 Defendants’ alleged ownership of copyrights. Dkt. Nos. 16-17; *see* Dkt. No. 50. The gravamen
 23 of Defendants’ copyright claims allege that they are the owners of *all* copyrights in and to Star
 24 Control I and II³, and assert that Stardock has infringed Defendants’ copyrights via its upcoming

25 ³ Except for a portion of the music from Star Control I and II that Defendants allege was licensed.
 26 Dkt. No. 50, FACC, ¶ 129.

1 *Origins* game. *Id.* Defendants' pleadings identify only two copyright registrations: U.S.
 2 Copyright Registration No. PA 2-071-496 for "Star Control II" covering "all computer program
 3 code for that game" (the "'496 Registration"), and U.S. Copyright Registration No. PA 2-107-340
 4 for "Star Control II" covering "all of the audiovisual and written content in the game" (the "'340
 5 Registration") (together, "Defendants' Alleged Registrations"). Dkt. No. 50, FACC, ¶ 45, Ex. 6-
 6 7. The parties are currently engaged in discovery, and no dispositive motions have yet been filed.
 7

8 **III. RELEVANT FACTUAL BACKGROUND**

9 a. The Classic Star Control Games Marketed and Sold by Accolade

10 *Star Control* is a well-known space adventure video game franchise that has generated an
 11 almost cult-like following in the science fiction, video game community. Wardell Decl. at ¶2.
 12 The franchise was created under an October 7, 1988 development and publishing license
 13 agreement (the "1988 Agreement") between Accolade, Inc. ("Accolade") and Reiche. Dkt. No.
 14 50, FACC, Ex. 1. Per the 1988 Agreement, Accolade developed and published the original *Star*
 15 *Control* ("Star Control I") in 1990, and a sequel in 1992 entitled *Star Control II: The Ur-Quan*
 16 *Masters* ("Star Control II"). Subsequently, in 1996, Accolade developed and published *Star*
 17 *Control III: The Kessari Quadrant* ("Star Control III") *without Defendants' involvement*. Star
 18 Control I, II, and III are collectively referred to as the "Classic Star Control Games."

19 Per to the 1988 Agreement, Accolade held the exclusive license to, *inter alia*, market and
 20 distribute the Classic Star Control Games as well as create derivative works, *particularly sequels*,
 21 based on the games. *Id.* at Ex. 1, ¶ 3.3. Per that Agreement, Accolade was the *owner* (not
 22 licensee) of the title, packaging concept, and packaging design for the Classic Star Control Games
 23 and derivatives thereof; all copyrights and proprietary rights in all derivative works by Accolade
 24 and derivative products, subject to Reiche's purported copyrights in the Classic Star Control
 25 Games and purported derivative works by Reiche; as well as any trademarks adopted and used by
 26 Accolade in the marketing of the Classic Star Control Games and any derivative products thereof

(collectively the “Star Control IP”). *Id.*

b. Stardock Purchases the Star Control IP from Atari

In 1999, Atari, Inc. (“Atari”) acquired Accolade. Wardell Decl. at ¶3. Atari assumed all rights under the 1988 Agreement, including the Star Control IP. *Id.* Several years later, in 2013, Stardock paid \$300,000 to purchase⁴ all of Atari’s rights in the Star Control IP. *Id.* Per that purchase, Stardock owns the Star Control IP, including (1) the STAR CONTROL mark and other trademarks adopted and used by Accolade in the marketing and publishing of the Classic Star Control Games, (2) U.S. Copyright Registration No. PA 799-000 for the work titled “Star Control 3,” and (3) any other rights in the Classic Star Control Games originally owned by Accolade.

Despite the transactions discussed above, Defendants continue to assert that they are the “creators” of *Star Control*—without ever specifically identifying *what exactly they created*. Instead, they rely on general allegations of Reiche’s creation of game “concepts.” *See, e.g.*, Dkt. No. 50, FACC, ¶12. As explained below, Defendants do *not* own copyrights in and to *Star Control* I or II, beyond perhaps Ford’s alleged authorship of the source code for *Star Control* II.

c. Stardock's Creation and Promotion of the Origins Game

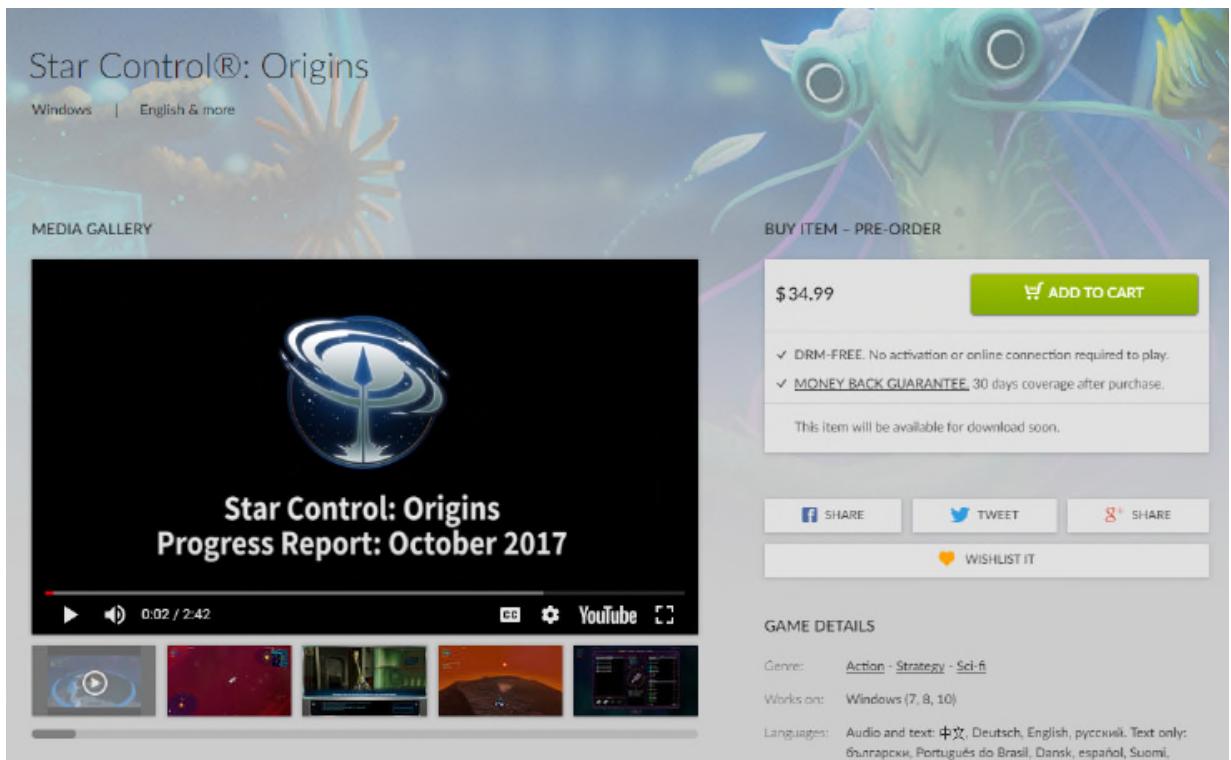
In 2013, immediately after its acquisition of the Star Control IP, Stardock began developing *Origins*.⁵ Wardell Decl. at ¶4. Defendants have known⁶ about Stardock's intention to

⁴ Stardock executed an asset purchase agreement with Atari dated July 18, 2013 (“APA”) to acquire these rights; the APA was approved on July 25, 2013 by the U.S. Bankruptcy Court for the Southern District of New York overseeing the distribution of Atari’s assets. *See In re Atari, Inc., et al.*, Case No. 13-10176 (Bankr. S.D.N.Y. 2013); Dkt. No. 51, SAC, ¶ 17, Ex. D; Dkt. No. 50, FACC, Ex. 5.

⁵ In fact, the creation of *Origins* was the very reason Stardock purchased the Star Control IP from Atari. Wardell Decl. at ¶4.

⁶ Almost immediately after Stardock's acquisition of the Star Control IP from Atari in 2013, Stardock reached out to Defendants and offered them a chance to collaborate with Stardock in the development of *Origins*. *Id.* at ¶5. Thus, Defendants knew about Stardock's development of a new Star Control game at least as early as 2013. *Id.*

1 create *Origins* from the beginning. *Id.* at ¶5. In January 2014, Stardock began production of
 2 *Origins* and has spent over \$9 million to date developing the game, plus marketing costs. *Id.* at
 3 ¶18. Over 10,000 customers have already paid to preorder *Origins* and this number is only
 4 expected to rise as the September 20, 2018 release date approaches. *Id.* at ¶20. In the fall of 2017,
 5 Stardock began releasing promotional content for *Origins*, such as the October 2017 progress
 6 report video on various sites:



20 Stardock then released Fleet Battles on November 16, 2017. *Id.* at ¶6. Stardock continued to
 21 provide content relating to *Origins*, such as DLC packs provided on distributor websites such as
 22 Steam and GOG. The DLC packs are provided as incentives to pre-order the *Origins* game, while
 23 also generating continued interest and public excitement for the impending release. *Id.* An
 24 example DLC is shown below:



On June 11, 2018, in anticipation of the massive “E3” gaming conference starting the next day, Stardock announced the official release date for *Origins*: September 20, 2018. *Id.* at ¶7. The following image from Stardock’s website announces this release, with a new trailer for *Origins*. Stardock continues to heavily promote the *Origins* release. *Id.* at ¶¶19-23, 25, 27-28, Exh. E.



1 **Notably, in an event to avoid further controversy with Defendants, Stardock has not**
 2 **used any copyrightable expression from Star Control I or II in the *Origins* game.** *Id.* at ¶7.
 3 As discussed below, any similarities between *Origins* and Star Control I or II are nothing more
 4 than unprotectable ideas, game concepts, or *scenes-a-faire*. And it is undisputed that *Origins*
 5 does not use *any* source code from Star Control I or II, nor would such use even be realistic given
 6 the vast changes in hardware and coding techniques over the last 25 to 30 years. *Id.*

7 d. Defendants' DMCA Notices Targeting Stardock's DLC for Origins

8
 9 On August 17, 2018, Defendants submitted a notice of copyright infringement under the
 10 DMCA, 17 U.S.C. § 512(c), to Steam falsely alleging that (1) they are the owners of Defendants'
 11 Alleged Registrations as well as certain copyrights in Star Control 3; and (2) Stardock's Fleet
 12 Battles game, *Star Control: Origins* – Chenjesu Content Pack, and *Star Control: Origins* – Arilou
 13 Content Pack available on the Valve platform infringe their copyrights ("DMCA Notice to
 14 Steam"). *Id.* at 9, Exh. A. As a result, Steam removed the identified works from its platform
 15 pursuant to the DMCA procedures. *See* 17 U.S.C. § 512(g).

16 Promptly after being informed of the DMCA Notice to Steam, on August 20, 2018,
 17 Stardock submitted a counter-notice pursuant to 17 U.S.C. § 512(g). *Id.* at ¶10, Exh. B. Just two
 18 days later, counsel for Stardock reached out to Defendants' counsel, demanding that the DMCA
 19 Notice to Steam be withdrawn given the obvious inaccuracies made therein. Weikert Decl., ¶4,
 20 Exh. C. Defendants' counsel responded denying that the notice was false, and refusing to
 21 withdraw it. *Id.* at ¶5, Exh. D. Moreover, counsel made it clear that Defendants had *no intention*
 22 of *ceasing* to submit DMCA notices, stating that they "reserve the right to serve further DMCA
 23 notices as additional examples of Stardock's [alleged] infringement are identified and as
 24 authorized by the DMCA." *Id.* At no point have Defendants identified any specific content that
 25 allegedly infringes; despite a direct request to do so on August 24, 2018, Stardock has still never
 26 received a response from counsel. Weikert Decl., 6.

1 On August 21, 2018, Defendants submitted another DMCA notice to GOG, including the
 2 same unsupported allegations of ownership presented in their prior notice and claiming that
 3 Stardock's Fleet Battles infringes their copyrights ("DMCA Notice to GOG"). Wardell Decl. at
 4 ¶11, Exh. C. Likewise, GOG removed the identified works from its platform. On August 27,
 5 2018, after being advised of the DMCA Notice to GOG, Stardock filed a counter-notice pursuant
 6 to 17 U.S.C. § 512(g). *Id.* at ¶12, Exh. D. As with the DMCA Notice to Valve, Defendants
 7 again neglected to identify with any specificity what copyrights Stardock's Fleet Battles allegedly
 8 infringe. Notably, both notices reference this action as a filing "seeking a court order to restrain,"
 9 in an apparent but misguided attempt to prevent replacement of the content. *See* DMCA §
 10 512(g)(2)(C).

11 **IV. ARGUMENT**
 12

13 In this case, irreparable harm to Stardock is imminent. After expending five (5) years of
 14 effort developing *Origins*, and on the eve of Stardock's critical September 20th global release,
 15 Defendants' abuse of the DMCA process enables them to foreclose Stardock's entire distribution
 16 channel without based on merely allegations and without proving anything. After failing to seek
 17 injunctive relief at any point over the five (5) year period that they knew of *Origins* development,
 18 Defendants now exploit the DMCA process to perform an end run around Rule 65. It is
 19 Defendants' burden, not Stardock's, to meet the requirements for injunctive relief, which is
 20 unlikely given Defendants' tenuous copyright claims that are not entitled to any presumption of
 21 validity. *See* 17 U.S.C. § 410(c). But these "backdoor" injunctions via the DMCA flips the
 22 process on its head, forcing Stardock to now seek relief from this Court to maintain the status quo
 23 in the face of Defendants' actions and threats, despite Defendants' failure to show any basis for
 24 injunctive relief or post the required bond. To prevent irreparable harm and protect Stardock's
 25 massive investment in the *Origins* release, this Court should grant Stardock's requested relief and

1 require the parties to follow Rule 65.⁷

2 Also, Stardock will demonstrate that injunctive relief is appropriate by satisfying the
 3 required four factor test—the same test that Defendants have avoided through their extrajudicial
 4 self-help. On either basis—based on Defendants’ end run around the Federal Rules, or based on
 5 Stardock’s showing here—a restraining order maintaining the status quo, allowing *Origins* to be
 6 distributed on its promised release date, is appropriate. This relief is necessary to protect
 7 Stardock’s reputation and business relationships associated with the *Origins* launch. *See*
 8 *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 838 (9th Cir. 2001) (affirming
 9 injunctive relief to restore status quo where movant was faced with upcoming delivery deadline,
 10 and needed to “obtain the immediate release of its goods to avoid irreparable harm stemming
 11 from lost contracts and customers, and harm to its business reputation and goodwill.”)
 12 Furthermore, an Order to Show Cause regarding the issuance of a preliminary injunction should
 13 issue for the same reasons.

14 V. **LEGAL STANDARD**

15 a. The DMCA Takedown Procedure

16 Title II of the DMCA (17 U.S.C. § 512) provides a system under which an online service
 17 provider, to avoid liability, *must* promptly remove or disable alleged infringing content upon
 18 proper notification from the alleged copyright owner. 1 Raymond T. Nimmer, *Law of Computer*
 19 *Technology* § 15:15 (2018). This Court has explained the DMCA takedown procedures set forth
 20 in 17 U.S.C. §§ 512(c) and (g) as follows:

21 (1) [a copyright owner who] contends that a website is displaying material in
 22 violation of his or her copyright must provide written notification of the
 23 infringement to the service provider’s agent.

24
 25

⁷ Should the Court grant the requested relief here, Stardock will voluntarily agree to not issue any
 26 DMCA notices related to this litigation during its pendency.

- (2) Once notice is received, the service provider, to avoid liability, *must expeditiously remove or disable* access to the material and must notify the affected user promptly.
- (3) [T]he affected user may then submit a ‘counter-notification,’ consisting of a statement, under penalty of perjury, that the user has a good faith belief that the material was removed as a result of a mistake or misidentification of the material.
- (4) Upon receipt of a counter-notification, the service provider must promptly provide... a copy of the counter-notification [to the copyright owner], and inform [him or her] that it will replace the removed material or cease disabling access to it in 10 business days *unless he or she provides notice that he or she has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.*

Williams v. Life's Rad, No. C 10-0086 SBA, 2010 WL 5481762, at *3 (N.D. Cal. May 12, 2010) (internal citations omitted) (emphases added).

b. Standard for Injunctive Relief

The standard for issuance of a preliminary injunction is identical to the standard for issuance of a temporary restraining order. *NML Capital, Ltd. v. Spaceport Sys. Int'l, L.P.*, 788 F. Supp. 2d 1111, 1117 (C.D. Cal. 2011) (quoting *Lockheed Missile & Space Co. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995)); see also *Stuhlbarg Int'l Sales Co.*, 240 F.3d at 839 n.7.

Typically, a party seeking a preliminary injunction (or temporary restraining order) is required to make a showing as to each of four elements: (1) a likelihood of success on the merits, (2) a likelihood of irreparable injury to the plaintiff if injunctive relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) an advancement of the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009); *see also Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). A preliminary injunction is also appropriate if a plaintiff satisfies the “serious questions” test by raising “serious questions going to the merits” (as opposed to a likelihood of success), demonstrating that the “balance of hardships tips sharply in the plaintiff’s favor,” and

1 satisfying the remaining two factors. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
 2 1134-35 (9th Cir. 2011) (stating that “‘serious questions going to the merits’ and a balance of
 3 hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction,
 4 so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the
 5 injunction is in the public interest”). As shown below, Stardock can satisfy either test.

6 **VI. IMMEDIATE RELIEF IS NECESSARY TO STOP DEFENDANTS’ IMPROPER**
 7 **USE OF DMCA NOTICES (AND THREAT OF ADDITIONAL NOTICES) TO**
 8 **EFFECTIVELY ENJOIN THE ORIGINS GAME WITHOUT DUE PROCESS**

9 Through the DMCA takedown procedure, Defendants have done no more than claim
 10 infringement and identify this lawsuit. Yet, without any evaluation whatsoever of Defendants’
 11 claims, the content is removed from the distribution channels that are essential to Stardock’s
 12 business. Indeed, service providers (such as Steam and GOG) have every incentive to take down
 13 targeted content immediately, regardless of the merits (or lack thereof) of a takedown request, as
 14 any other behavior causes the provider to sacrifice their immunity under the DMCA.

15 The practical effect of the DMCA takedown scheme leads to precisely the situation here.
 16 Despite a pending litigation matter on the merits, and without any showing by Defendants, they
 17 have successfully and immediately blocked the online distribution of any *Origins* content that
 18 they unilaterally decide they don’t like. Defendants’ “self-help” injunction via the DMCA
 19 violates the established principles of due process, ignores the requirements of Rule 65, violates
 20 the rule against presumption of harm, and results in drastically different outcomes for internet
 21 businesses as opposed to their brick and mortar counterparts. For all these reasons, this Court
 22 should grant the requested relief, and maintain the status quo until the copyright issues central to
 23 this litigation may be determined on the merits. Indeed, the relief that Stardock seeks here is
 24 consistent with the *only* interpretation of “***seeking a court order to restrain***” found in §
 25 512(g)(2)(C) that can allow the DMCA to coexist with Rule 65 and satisfy due process concerns.

1 a. Injunction Without Proper Due Process Protections Is Impermissible

2 The DMCA takedown process, as applied to the facts here, is at odds with the
 3 requirements of Rule 65 and violates due process protections. In fact, the application of the
 4 DMCA takedown process, to effectively impound allegedly infringing virtual goods, suffers from
 5 similar defects that were previously encountered with the seizure process for physical goods.
 6 Ultimately, to satisfy due process and other concerns, the copyright impoundment process was
 7 found to **require** the protections of Rule 65. The same reasoning must apply in the virtual realm.

8 Specifically, prior to the 2001 revisions to Rule 65, a party could attempt to leverage the
 9 then-existing Copyright Rules to obtain a writ of seizure of allegedly infringing articles without a
 10 hearing. See *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 923 F. Supp. 1231,
 11 1261 (N.D. Cal. 1995). But upon challenges to the Copyright Rules as running afoul of due
 12 process, the courts determined that, for impoundment based on alleged copyright infringement, a
 13 party *had to satisfy the requirements of Rule 65*. *Id.* at 1262 (emphasis added). Accordingly, the
 14 rules were later amended to explicitly close this loophole. See Fed. R. Civ. P. 65, Adv. Cmte's
 15 note to 2001 amend. ("Courts have naturally turned to Rule 65 in response to the apparent
 16 inconsistency of the former Copyright Rules with the discretionary impoundment procedure ...

17 **Rule 65 procedures also have assuaged well-founded doubts whether the Copyright Rules
 18 satisfy more contemporary requirements of due process."** (emphasis added).

19 Now, the same problem is presented by the application of the DMCA takedown process to
 20 effectively impound virtual content, absent the attendant protections of Rule 65. The Court
 21 should grant the requested relief to close this loophole, and maintain the status quo.

22 b. Harm Cannot Be Presumed from Alleged Copyright Infringement

24 The DMCA was enacted in 1998. The internet landscape has changed drastically since
 25 then, and the law has changed substantially as well. Twenty years ago, a party showing a
 26 likelihood of success on the merits (or actual success at trial) could *presume* the harm required for

1 an injunction to issue. But since the enactment of the DMCA, that presumption has been
 2 expressly rejected and no longer exists. Thus, even if Defendants had made a showing on the
 3 merits (which they have not), they still would not be entitled to the presumption of harm that they
 4 are effectively granted through the DMCA takedown process.

5 In 2006, eight years *after* the DMCA was enacted, the Supreme Court examined the
 6 requirements necessary for an injunction to issue. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S.
 7 388, 390 (2006). Before the Supreme Court was a general rule in favor of injunctive relief based
 8 on a *finding* of patent infringement. The Supreme Court examined the treatment of injunctions
 9 under the Copyright Act to inform its decision, and ultimately rejected any general rule that
 10 ignored the required four-factor analysis. *See id.* at 392-393 (“... this Court has consistently
 11 rejected invitations to replace traditional equitable considerations with a rule that an injunction
 12 automatically follows a determination that a copyright has been infringed.”). But in the present
 13 situation, the DMCA takedown scheme has already imposed an injunction on material related to
 14 *Origins* (and threatens more) based on mere *allegations* of copyright infringement within a
 15 DMCA takedown letter. This flies in the face of the Supreme Court’s teachings.

16 Subsequently, courts made it abundantly clear that the teachings of *eBay* expressly apply
 17 to copyright infringement actions, and to preliminary injunctions as well as permanent
 18 injunctions.

19 We therefore conclude that the propriety of injunctive relief in cases arising under
 20 the Copyright Act must be evaluated on a case-by-case basis in accord with
 21 traditional equitable principles and without the aid of presumptions or a “thumb
 on the scale” in favor of issuing such relief.

22 *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 979–81 (9th Cir. 2011). Despite the well settled
 23 law against presumed injunctions in copyright cases, the DMCA takedown process does just that,
 24 by effectively enjoining the targeted content without any showing of harm whatsoever, let alone
 25 the showing of irreparable harm (along with other factors) required for an injunction to issue.
 26

c. The Impact of the DMCA Takedown Process Causes Copyright Disputes to be Dramatically Different Based Solely on Distribution Channel

If the DMCA takedown process is permitted to circumvent the requirements discussed above, this creates a stunning dichotomy in copyright law. The first body of copyright law, applied to brick and mortar distribution channels, requires a party seeking injunctive relief to satisfy procedural (Rule 65) and substantive (the four-factor test) requirements. The second body of copyright law, applied to internet content, allows a party providing a bare allegation of infringement to effectively obtain an injunction while completely bypassing these requirements.

Thus, the DMCA enables online copyright disputes to exist in an entirely different universe than offline copyright cases, with the drastic consequence that internet content can be immediately and indefinitely “impounded,” but the same content in a physical medium is worthy of procedural safeguards. Why should whether a game is distributed on compact discs to a retailer, or online via a content channel such as Steam, drastically affect the rights and remedies available in copyright litigation? This cannot possibly be the intention of the DMCA takedown process, but it is exactly the effect, unless this Court grants the relief requested and allows the pending dispute to be determined on its merits.

d. Defendants Cannot Meet Their Required Burdens for Injunctive Relief

Of course, Defendants have not moved this Court for any injunctive relief. And even if they did, Defendants could not make the showing necessary for such relief. (Nor would such an action be timely after Defendants waited for Stardock’s critical release deadline to approach). Most notably, as shown in Section VII, Defendants cannot identify anything approaching the imminent harm to Stardock that will transpire if *Origins* is blocked from its September 20th global release date.

Additionally, Defendants have not met the requirements of the DMCA to overrule Stardock's counter-notices, although the statute is admittedly vague. The DMCA requires that

1 access to the contested content be restored per the counter notice, unless the complaining party
 2 submits notification “that such person has filed an action seeking a court order to restrain the
 3 subscriber” from infringing activity. *See* 17 U.S.C. 512(g)(2)(C). But here, Defendants have
 4 done nothing more than identify this litigation. For all the reasons discussed above, the only
 5 reasonable interpretation of “*filed an action seeking a court order to restrain*” is an actual
 6 motion under Rule 65 seeking injunctive relief. Defendants’ apparent presumption (that the
 7 counter-notice can be nullified by a mere reference to a pending action) ignores the fact that it
 8 may be years before a finding on the merits, and therefore the provision offers no protection for
 9 meritless takedown notices.⁸ Thus, under Defendants’ interpretation, any content targeted by
 10 Defendants’ DMCA notices will remain in exile, unless this Court orders otherwise. To bring the
 11 DMCA in harmony with Rule 65, and address all of the above issues, this Court should maintain
 12 the status quo until the copyright issues central to this litigation may be determined on the merits.

13 **VII. INJUNCTIVE RELIEF MAINTAINING THE STATUS QUO IS APPROPRIATE**

14
 15 Stardock contends that based solely on the failure of Defendants to meet the requirements
 16 for injunctive relief (or even move the Court for such relief), it is appropriate for the Court to
 17 issue an Order prohibiting existing and future DMCA takedown notices—by either party—
 18 relating to the copyright claims at issue in this litigation. Nonetheless, if required, Stardock will
 19 demonstrate that each of the four elements evaluated for injunctive relief are satisfied here.⁹

20
 21 ⁸ Nonetheless, service providers, understandably scared of potential liability and without
 22 incentive to consider the merits, are unwilling to risk interpreting the requirement of an “action
 23 seeking a court order to restrain.” The DMCA provides a one-way safe harbor mechanism to
 24 protect service providers from liability to copyright claimants, but does not provide any avenue
 25 for wrongfully accused content owners to recover for removal of content that is ultimately found
 26 to be non-infringing. *See* 17 U.S.C. 512(g)(1). Thus, reasonable service providers will always err
 on the side of keeping content down when faced with an issue open to interpretation.

⁹ Additionally, Stardock is prepared to post a required bond, although determining an appropriate
 value for such a bond is necessarily challenging because of the backwards nature of the process
 here and the sparse details provided by Defendants as to their alleged copyright claims.

1 a. Defendants are Unlikely to Succeed on Their Copyright Claim

2 To obtain a temporary restraining order, a party must show that it is likely to succeed on
 3 the merits, but “if a plaintiff can only show that there are serious questions going to the merits—a
 4 *lesser showing than likelihood of success on the merits*—then a preliminary injunction may still
 5 issue if the ‘balance of hardships tips sharply in the plaintiff’s favor,’ and the other two Winter
 6 factors are satisfied.” *All. for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017)
 7 (internal citations omitted) (emphasis added). To prevail on a claim for copyright infringement,
 8 the moving party must show (1) ownership of a valid copyright and (2) copying of the original
 9 elements of the protected work. *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361,
 10 (1991). Defendants are unlikely to succeed on either point, nonetheless both. As such, Stardock
 11 is likely to succeed on the merits in its defense of Defendants’ copyright claims or, at the very
 12 least, there are serious questions going to the merits.

13
 14 i. *Defendants cannot prove copyright ownership*

15 The party alleging copyright infringement bears the burden of proving copyright
 16 ownership. *See Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 654 F.3d 958, 962 (9th Cir. 2011).
 17 “To prove ownership, plaintiff must establish either that it authored the asserted work, or that
 18 there has been a ‘transfer of rights or other relationship between the author and the plaintiff so as
 19 to constitute the plaintiff as the valid copyright claimant.’” *Art of Living Found. v. Doe*, No.
 20 5:10-cv-05022-LHK, 2012 U.S. Dist. LEXIS 61582, at *23-24 (N.D. Cal. May 1, 2012) (quoting
 21 4-13 Nimmer on Copyright § 13.01). Defendants cannot meet their burden of proof with respect
 22 to copyright ownership by authorship or transfer of rights, for the following reasons, among
 23 others: (1) Defendants’ Alleged Registrations are not entitled to a presumption of validity and are
 24 otherwise fatally flawed; (2) Defendants’ purported assignments of copyrights are invalid and
 25 unenforceable; and (3) Defendants’ contributions to Star Control I and II consist of unprotectable
 26 ideas or concepts.

1 Defendants waited to file applications for Defendants' Alleged Registrations until after the
 2 filing of this lawsuit and more than twenty-five (25) years after the claimed date of first
 3 publication of the works embodied therein. Dkt. No. 50, FACC, Ex. 6-7. Thus, per 17 U.S.C. §
 4 410(c), the registration does *not* constitute *prima facie* evidence of the validity of the copyright or
 5 the facts stated in the certificate, so Defendants have the difficult burden of establishing both
 6 validity and ownership. Also, Defendants do not have any registrations covering Star Control I
 7 (despite their false claim in their DMCA notices) and therefore cannot claim rights therein.
 8 Weikert Decl. at ¶3, Exh. B (Exhs 6-7).

9 Moreover, Defendants' Alleged Registrations are fatally flawed. As to the '496
 10 Registration, the Copyright Act requires the depositing of a work with the Copyright Office for
 11 registration. *See* 17 U.S.C. § 407-408. Here, Defendants have not deposited a copy of the
 12 original MS-DOS source code for Star Control II (from 1992) and instead have substituted
 13 different code (from 2001) from a version made for the 3DO game console. *See* Dkt. No. 51,
 14 SACC, Ex. T. Additionally, both Ford and Reiche are listed as claimants, but only Ford is listed
 15 as an author, and no assignment has been produced addressing this discrepancy.¹⁰ *See* 17 U.S.C.
 16 § 204(a). For this and other reasons, the '496 Registration is invalid.

17 With respect to the '340 Registration, Defendants allege to own certain audiovisual
 18 material and script/screenplay contributions by a number of different authors "by written
 19 agreement." However, any such written agreements are invalid and unenforceable, as Defendants
 20 attempt to claim rights in works that they do not actually own. *See* Dkt. No. 50, FACC, Ex. 7;
 21 Weikert Decl. at ¶3, Exh. B. Defendants are apparently now aware of this discrepancy and, *after*

22 ¹⁰ The correspondence with the Copyright Office during the examination of the '496 Registration
 23 is telling. Dkt. No. 51, SACC, Ex. T. Originally, both Defendants were listed as authors in the
 24 application for the '496 Registration seeking registration for "all audiovisual materials, computer
 25 programming, text, graphics in the game and accompanying materials and musical score" in Star
 26 Control II. *Id.* However, the Copyright Office determined that in light of evidence to the
 contrary, *e.g.*, the game credits, Defendants were unable to support such a claim and were forced
 to amend the application to only claim authorship of the computer program code by Ford. *Id.*

1 *the filing of their counterclaim* (raising Rule 11 concerns), attempting to collect assignments for
 2 the transfer of certain works contained within Star Control I and/or II from the actual authors
 3 listed in the '340 Registration. Weikert Decl. at ¶2, Exh. A (73-79). There are serious questions
 4 as to the validity of such after-the-fact assignments, and raise grave concerns about Defendants'
 5 statements regarding their purported ownership in their pleadings to the Court.

6 Furthermore, Defendants are attempting to claim uncopyrightable ideas or concepts in
 7 Star Control I and II. As an initial matter, as to Star Control I, Defendants have produced no
 8 documents showing they contributed any copyrightable content whatsoever, and as to Ford's
 9 alleged source code for Star Control II, it is undisputed that Stardock does not use any such
 10 source code, nor would this even be technologically viable. Wardell Decl. at ¶7. Thus,
 11 Defendants are left with only their vague claims of partial authorship for "script/screenplay,
 12 audiovisual work – lead author" and "production, audiovisual work," but have produced *no*
 13 documentation showing that they made any such contributions to Star Control II. Dkt. No. 50,
 14 FACC, Ex. 7; Weikert Decl. at ¶3, Exh. B (Exh. 7). Thus, Defendants' purported contributions
 15 (if any) ultimately amount to no more than mere ideas and general concepts often found in space
 16 combat games.

17 **Game concepts are not protectable under U.S. copyright law.** *See generally Anti-*
 18 *Monopoly, Inc. v. Gen. Mills Fun Grp.*, 611 F.2d 296, 300 n.1 (9th Cir. 1979). Section 102(b) of
 19 the Copyright Act expressly excludes copyright protection for "any idea, procedure, process,
 20 system, method of operation, concept, principle, or discovery, regardless of the form in which it is
 21 described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b); *see also* 37
 22 C.F.R. § 202.1(b); *Feist*, 499 U.S. at 344-45 (explaining that "[t]he most fundamental axiom of
 23 copyright law is that 'no author may copyright his ideas or the facts he narrates.'") (quoting
 24 *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985)); *see also*
 25 *DaVinci Editrice S.R.L. v. ZiKo Games, LLC*, 183 F. Supp. 3d 820, 831 (S.D. Tex. 2016) ("...
 26 copyright does not protect game rules, procedures, or winning conditions..."); *Anti-Monopoly*,

1 *Inc.*, 611 F.2d 296 at 300 n.1 (The copyright laws are not involved in this case because business
2 ideas, such as a game concept, cannot be copyrighted”). Here, Defendants’ contributions to Star
3 Control II consist of mere ideas and concepts that fail to rise to the level of protectable
4 copyrightable expression.

5 Furthermore, expressions that are standard in the treatment of an idea, known as *scènes-à-
6 faire*, are also not protectable. *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 208 (9th Cir.
7 1988). And ideas or concepts that are indistinguishable from their expression are uncopyrightable
8 under the merger doctrine. *See Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 765 (9th Cir. 2003).
9 Defendants cannot successfully advance copyright claims on these bases.

ii. *Defendants cannot prove copying*

Even setting aside the many issues regarding ownership, Defendants are still unlikely to demonstrate that Stardock has copied any protectable content. Proof of copying requires a showing of (1) access to the protected work before creating the accused work and (2) that a substantial similarity of expression exists between the protected and accused works. *Narell v. Freeman*, 872 F.2d 907, 910 (9th Cir. 1989). The relevant issue here is whether there is a substantial similarity between *Origins* and Defendants' *protectable* expression. There is not (or at the very least, there are serious questions as to the merits of Defendants' assertions). The Ninth Circuit has long held that the "source of the similarity must be ... covered by plaintiff's copyright." *See Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1476 (9th Cir. 1992). But Defendants vague allegations, and failure to produce copies of the works claimed, provide no specificity as to what their claim encompass. Without knowing the precise contours of Defendants' claimed expression, it is impossible for the Court to make a determination as to substantial similarity. *See Antonick v. Elec. Arts, Inc.*, 841 F.3d 1062, 1066 (9th Cir. 2016) ("Antonick's claims rest on the contention that the source code of the Sega Madden games infringed on the source code for Apple II Madden. But, none of the source code was in evidence.

1 The jury therefore could not compare the works to determine substantial similarity."); *Seiler v.*
2 *Lucasfilm, Ltd.*, 808 F.2d 1316, 1319 (9th Cir. 1987) ("There can be no proof of 'substantial'
3 'similarity' and thus of copyright infringement unless Seiler's works are juxtaposed with Lucas'
4 and their contents compared.").

5 Furthermore, any similarities between Defendants' Alleged Registrations and *Origins* are
6 unprotectable general ideas or *scenes-à-faire*, like the overall game play or the incorporation of
7 aliens and spaceships in general. These are not considered in a substantial similarity analysis.
8 See, e.g., *Data East USA, Inc.*, 862 F.2d at 208 (finding no copyright infringement where the
9 similar features in two video games were the result of constraints inherent in the sport of karate);
10 *Blizzard Entm't, Inc. v. Lilith Games (Shanghai) Co.*, 149 F. Supp. 3d 1167, 1173 (N.D. Cal.
11 2015) (finding no copyright infringement where the similarities in two video games were stock
12 characters unprotectable under the *scenes-à-faire* doctrine); *DaVinci Editrice S.R.L. v. ZiKo*
13 *Games, LLC*, 183 F. Supp. 3d 820, 831 (S.D. Tex. 2016) (holding that game play is
14 unprotectable). In light of the above, Stardock is likely to succeed on the merits.

b. Stardock Will Suffer Irreparable Harm

17 Irreparable injury is the “single most important prerequisite for the issuance of a
18 preliminary injunction.” *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2nd Cir. 2005).
19 The action to be enjoined need not be the exclusive cause of injury so long as it inflicts
20 “cognizable irreparable injury” sufficient to support the injunction. *M.R. v. Dreyfus*, 697 F.3d
21 706, 728-729 (9th Cir. 2012). The irreparable harm needs to be likely, but not certain to occur.
22 *Michigan v. United States Army Corp. of Engineers*, 667 F.3d 765, 788 (7th Cir. 2011). A
23 “substantial loss of business” shows “irreparable injury.” *Doran v. Salem Inn, Inc.*, 422 U.S. 922,
24 932 (1975). *See also Grand River Enterprise Six Nations, Ltd. v. Pryor*, 481 F.3d 60,67 (2nd Cir.
25 2007) (loss of current or future market share may constitute irreparable harm); *Celsis In Vitro,*
26 *Inc. v. CellzDirect, Inc.*, 664 F.3d 922 (Fed. Cir. 2012) (irreparable harm included price erosion

1 and lost business opportunities). Damage to a company's reputation may also be irreparable
 2 injury. *United Healthcare Ins. Co. v. Advance-PCS*, 316 F.3d 737, 741 (8th Cir. 2002).

3 Here, Stardock will suffer irreparable harm if Defendants are able to utilize the DMCA
 4 notice procedures to prevent Stardock from releasing *Origins* through Steam and GOG. Steam in
 5 particular is the largest online retailer of digital gaming content, and historically over 80 percent
 6 of Stardock's sales are through Steam. Wardell Decl. ¶ 15. If Defendants block the September 20
 7 release of *Origins*, Stardock stands to lose over \$9 million it spent on development, in addition to
 8 hundreds of thousands of dollars promoting *Origins*. *Id.* at ¶18. Since Stardock is a privately
 9 held company that self-funds its projects, release delays will require Stardock to severely cut back
 10 on its gaming staff by laying off approximately 26 employees. *Id.* at ¶ 33. Notably, this Court has
 11 issued injunctive relief on similar facts. *See Amaretto Ranch Breedables v. Ozimals, Inc.*, 2010
 12 WL 5387774, at *2 (N.D. Cal. Dec. 21, 2010) (establishing likelihood of irreparable harm if
 13 service provider complies with DMCA takedown notice during prime buying season).

14 The success of *Origins* is also critical to Stardock's growth plans, beyond just selling
 15 games, because it is the core title that validates Stardock's business development strategy and is
 16 central to the company's next phase of growth. *Id.* at ¶29. Stardock is already engaged with
 17 several partners, and if *Origins* is blocked, it will permanently harm Stardock's relationship with
 18 its business partners. *Id.* at ¶¶27-28. Further, a blocked *Origins* launch will prevent Stardock
 19 from successfully partnering with a console publisher, limiting *Origins* to PC only, and reducing
 20 its potential audience and sales by an estimated 50 percent. *Id.* at ¶21.

21 Moreover, the September 20, 2018 release date has been widely communicated to
 22 Stardock's customers, partners, and the press. *Id.* at ¶19, Exh. E. To date, over 10,000 customers
 23 have pre-ordered *Origins* with the expectation of a September 20, 2018 release date; another
 24 55,594 people have placed *Origins* on their Steam "Wishlist." *Id.* at ¶¶20-21. Almost 3.5 million
 25 people have visited the *Origins* store on Steam, and over 10 million people have seen *Origins*
 26 advertised on Steam alone. *Id.* at ¶¶22-23. The loss of revenue and the impact on consumer

1 confidence will be irreparable if Defendants are able to sabotage the release of *Origins* on
2 September 20, 2018; indeed, this case has already been the focus of intense media and public
3 scrutiny, and the damage from a failed launch would likely impact the sale of not only *Origins*,
4 but all of Stardock's offerings. *Id.* at ¶29. Even a brief delay in the release of *Origins* is likely to
5 have enormous negative impact. *See, e.g.*, Weikert Decl., ¶¶7-8. (One month release delay of
6 Battlefield V game causes Electronic Arts stock to dive over 9%). Not only would a delay have
7 massive economic consequences, but it would also likely lead to further incalculable losses as
8 impatient customers likely seek the game through piracy channels. Wardell Decl. at ¶31.

9 For all the above reasons, Stardock has easily established the likelihood of irreparable
10 harm if Defendants are not enjoined from abusing the DMCA system to block the release of
11 *Origins*.

c. The Balance Of Hardships Favors Stardock

14 A court considering an injunction considers the degree of harm that will befall the plaintiff
15 or the defendant if the injunction is improperly granted or denied. *Scotts Co. v. United Indus.*
16 *Corp.*, 315 F.3d 264, 284 (4th Cir. 2002). As shown above, the harm to Stardock if the injunction
17 is not granted would be devastating. By comparison, if the injunction is granted, Defendants will
18 suffer no significant injury. As described above, Defendants' copyright claim is deeply flawed,
19 and even if Defendants were to prevail, their damages would be purely monetary in nature. After
20 the *Origins* game is released, Defendants will continue to have the opportunity to pursue their
21 copyright claims, and have all legal remedies (including royalties) potentially available to them.
22 See *Amaretto Ranch Breedables*, 2010 WL 5387774, at *3. Thus, the balance of hardships
23 clearly favors Stardock.

d. The Requested Relief Is In The Public Interest

The “public interest” inquiry generally addresses the impact upon nonparties of granting

1 or withholding injunctive relief. *League of Wilderness Defenders/Blue Mountains Biodiversity*
2 *Project v. Connaughton*, 752 F3d 755, 766 (9th Cir. 2014). Here, the public interest factor
3 weighs heavily in favor of Stardock. The public, and in particular customers who have paid to
4 preorder *Origins*, are entitled to the release of the game. The public also benefits by avoiding the
5 layoffs of Stardock employees. In addition, Stardock's third party business partners will also be
6 impacted if an injunction is not granted. And the public interest is served by not allowing
7 perfunctory notices alleging infringement to indiscriminately shut down a competitor's business.
8 See *Design Furnishings, Inc. v. Zen Path, LLC*, 2010 WL 5418893, at *8 (E.D. Cal. Dec. 23,
9 2010)

10 ...the public interest is in fact benefitted by granting a preliminary injunction,
11 because absent eBay's policies, designed to avoid eBay's liability for intellectual
12 property infringement, it would be the claimed copyright holder who would bear
the burden of proving the copyright infringement.

13 **VIII. CONCLUSION**

14 For the reasons shown above, Stardock respectfully requests this Court enter an order
15 maintaining the status quo, in the form shown in the proposed order served herewith.

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Respectfully submitted,

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